

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

TAWAYNE DEVONE LOVE,

Petitioner,

v.

CIVIL ACTION NO. 2:08-cv-00192
(Criminal No. 2:03-cr-00187-01)

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION & ORDER

Pending before the court is the petitioner's Motion to Alter or Amend Judgment Pursuant to Federal Rules of Civil Procedure 59(e) [Docket 675] and Motion to Amend Pleading [Docket 676].

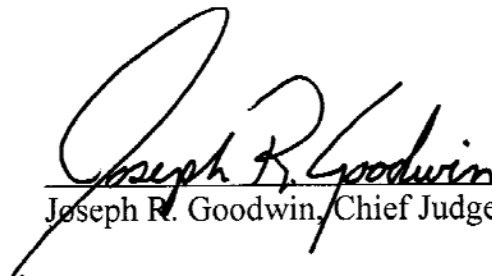
In his Rule 59(e) motion, the petitioner argues that the court "procedurally defaulted an actual innocence claim that had not been fully adjudicated on its merits." (Mot. Alter J. ¶ 5.) The petitioner argues the Magistrate Judge, in her Proposed Findings and Recommendation, did not assess the affidavits that Love had submitted to support his actual innocence argument. (*Id.*) Upon reconsideration, I agree. Although the Magistrate Judge referred to the affidavits, she did not assess their probative value. (Proposed Findings & Recommendations [Docket 666] 34-35.) She correctly noted that the petitioner's actual innocence claim had already been rejected by this court, but she failed to consider the new evidence submitted by the petitioner. (*Id.*) Therefore, I **GRANT** the petitioner's Motion to Alter or Amend this court's December 16, 2009 Memorandum Opinion &

Order by revoking my adoption of the Magistrate Judge's Findings and Recommendation and re-referring the petitioner's actual innocence issue to the Magistrate Judge.

The petitioner also objects that the issue of whether the government violated the plea agreement was wrongly decided. His Motion to Amend the Pleadings seeks to further bolster his argument on this issue. Since I have already decided to re-refer the actual innocence issue to the Magistrate Judge, I also re-refer the plea agreement violation issue and refer the petitioner's Motion to Amend the Pleadings [Docket 676] to the Magistrate Judge.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: January 11, 2010



Joseph R. Goodwin, Chief Judge